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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

Nos. 115-116

JOHN D. NAGLE, as Commissioner of Immigration at the port of San Francisco,
Petitioner,

vs.

LOI HOA.
Respondent.

JOHN D. NAGLE, as Commissioner of Immigration at the port of San Francisco,
Petitioner,

vs.

LAM YOUNG, for and on behalf of Phuong Con,
Respondent.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

The petitioner having appealed from the decision of the Circuit Court of Appeals for the Ninth Circuit

praying for the issuance of a writ of certiorari in the above entitled matter, and the same having been granted, respondent Loi Hoa presents herewith his statement and argument.

On appeal from the decision of the District Court the above entitled cases were consolidated by the Circuit Court of Appeals for the Ninth Circuit and it was therein stipulated by and between the appellant and appellee that the brief filed in the case of Loi Hoa might be considered in deciding the companion case, Phuong Con, as the points involved are identical.

The respondent, Loi Hoa, a Chinese person, 26 years of age, arrived at San Francisco October 31, 1925, and applied for admission as a Section 6 Saigon French Indo-China merchant, doing business at Cholon in said colony. Upon his arrival he presented a Section 6 certificate in the usual form, issued to him by the government of French Indo-China, and bearing the usual certificate of investigation and visa of the American Consul at Saigon, French Indo-China. He also presented a French Colonial passport issued by the said government. The record shows that the respondent attended school in a village near his home village in China until he was about 20 years of age in 1919, when he went to Cholon and became a member of his present firm. The Department of Labor denied him admission to the United States on the ground that he had not submitted a Section 6 certificate issued by the government to which he owed allegiance and of which he was a citizen or subject. The Section 6 certificate presented by the respondent

is in proper form, complies with all the requirements of the statute and contains all of the information required by law to be furnished in such cases. (Section 6 of the Act of 1882 as amended by the Act of July 5, 1884, 23 Stat. L. 115.) It contains the usual certificate of the American Consul that he has made an investigation of the statements therein contained and that the same are true. It also bears the usual visa of the American Consul as required by said Section 6. It also bears a visa of the American Consul classifying the respondent under the Immigration Act of 1924 as a non-immigrant, Section 3 (6) Class Treaty of Commerce and Navigation. (C. 190, 43 Stat. 153.)

The respondent, as defined under the immigration Act of 1924 and as construed by the Supreme Court in the recent case of *Chung Sum Shee et al. v. Nagle* (268 U. S. 336), is a non-immigrant, and the said law does not require such a person to procure a visa in addition to that required under other existing laws. The respondent presented the documents required by law to show that he is and has been a merchant for about six years and since the time he was about 20 years of age, and we submit that the right to admission as a Section 6 merchant is conclusively settled by recent judicial decisions, provided that the Section 6 certificate was executed by proper authority. The respondent's Section 6 certificate was issued by proper authority.

TREATY AND STATUTES INVOLVED.

Article II of the Treaty between the United States and China of November 17, 1880 (22 Stat. 826), provides:

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

Act of May 6, 1882, as amended and added to by Act of July 5, 1884, 23 Stat. L. 115, reads as follows:

> "An act to amend an act entitled: 'An act to execute certain treaty stipulations relating to Chinese, approved May sixth, eighteen hundred and eighty-two' ".

Section 6 provides:

> "That in order to the faithful execution of the provisions of this act, *every Chinese person*, other than a laborer, *who may be entitled by said treaty or this act* to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, *or of such other foreign government of which at the time, such Chinese person shall be a subject, in each* case to be evidenced by a certificate issued *by such government.* * * *"
> (Italics ours.)

ARGUMENT.

The law could not well be more explicit to show that a foreign government other than the Chinese government has authority under said Section 6 to issue certificates to Chinese persons who "at the time" may be a subject of or domiciled in such other foreign country. In fact, Rule 10 of May 1, 1917, and Rule 11 of October 1, 1926, of the Rules Governing Admission of Chinese, promulgated by the Department of Labor, concedes this fact by designating a number of foreign countries other than China, or Chinese officials, who are authorized to issue such certificates, the government of French Indo-China being one so designated.

Rule 11, Subdivision 2, provides as follows:

> "The officers whose titles are given below have each been authorized by his respective Government to issue to its citizens or subjects the certificates prescribed by section 6 of the act approved July 5, 1884:
>
> * * * * * * *
>
> French Indo-China:
>
> Annam—Administrateur des services civils et directeur des bureaux de la residence superieure (civil service administrator and director of the bureaus of the governor's mansion), at Tonkin.
>
> Cambodia—Administrateur des services civils, directeur des bureaux du Gouverneur de la Cochin-China (civil service administrator and director of the bureaus of the Governor of Cochin-China).
>
> Cochin-China—Administrateur des services civils, directeur des bureaux du Gouverneur de la Cochin-China (civil service administrator and director of the bureaus of the Governor of Cochin-China); chief of the immigration service.

Tonkin—Administrateur de services civils et directeur des bureaux de la residence superieure (civil service administrator and director of the bureaus of the governor's mansion.)

* * * * * * *"

The respondent's Section 6 certificate was signed by the Chief of the Immigration Service of the government of French Indo-China and it appears in the body of said document that he "has been designated for that purpose by the government of French Indo-China, and that the detained, in the language of the statute, has the permission of said government to go and reside within the territory of the United States after an investigation and verification by the United States in this country." In addition, the official character of said certificate is authenticated by the American Consul at Saigon, French Indo-China, who certifies that:

> "This certificate was originally signed by the Chief of the Immigration Service of Cochin-China delegated by the Governor General of Indo-China to sign Chinese certificates in Cochin-China."

There is no room to question the fact that the issuance of said certificate to the respondent was the act and deed of the French Indo-China government.

We understand that the petitioner does not now contend that the certificate was not the act of the French Indo-China government and that the regularly constituted officers issued the same, but that the respondent being a citizen of China, the proper official should have been one designated by the Chinese government to pass upon and issue said certificate.

The respondent's contention is that although he is a citizen of China and has never become a citizen of French Indo-China, or any other country, he, nevertheless, being a bona fide resident merchant domiciled in French Indo-China, the said government was the proper authority to issue said certificate, especially in view of the fact that the Chinese government has never authorized any person nor any official representative to issue Section 6 certificates to citizens of China residing in French Indo-China.

The Chinese Exclusion Laws, Act of May 6, 1882, (c. 126, 22 Stat. 58) as amended by the Act of July 5, 1884, (c. 220, 23 Stat. 115) and continued in force indefinitely by the Acts of April 29, 1902 (c. 641, 32 Stat. 176) and of April 27, 1904, (c. 1630, 33 Stat. 394, 428) clearly recognize the fact that there are Chinese subjects temporarily residing in foreign countries other than China who may desire to come to the United States, and for their accommodation and to facilitate the procurement of the necessary documents they are permitted to secure the required certificates granting permission to come to this country from the foreign government where they may be "at the time" residing. In many instances it would be impossible for Chinese persons residing in such other foreign countries to secure such certificates from the Chinese government for the reason that said government has no official representatives in such country and no facilities for making the investigation required by law, and hence, the law provides for the issuance of such certificates by foreign governments other than China. That this is the correct interpretation of the

law is also shown by the fact that Section 6, supra, further provides:

> "That such certificates may be visaed by the endorsement of the diplomatic representatives of the United States in the foreign country through which certificate issues or of the Consular representative of the United States at the port or place through which the person named is about to depart."

A review of the history of this legislation indicates that Congress intended to allow Chinese citizens, no matter where they might be domiciled, the same rights and privileges under the treaty of 1880 between the United States and China that obtain if domiciled in China. The Act of May 6, 1882 (22 Stat. 58), Section 6, is as follows:

> "That in order to the faithful execution of articles I and II of the Treaty in this Act before mentioned, every Chinese person other than a laborer, who may be entitled by said Treaty, and this Act to come to the United States, shall be identified as so entitled by the Chinese government in such case, such identity to be evidenced by a certificate issued under the authority of the said government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English stating such right to come, and which certificate shall state the name, title or official rank, if any, the age, height and all physical peculiarities, former occupation or profession and place of residence in China, of the person to whom the certificate is issued, and that such person is entitled, conformably, to the Treaty in this Act mentioned, to come within the United States. * * * "

After the passage of this Act and in the month of August, 1882, one Low Yam Chow, a Chinese person, citizen of China, and merchant from Panama, arrived at the port of San Francisco and made application for admission. He was denied admission on the ground that he did not possess a certificate of identification, etc., required by the aforesaid Act of May 6, 1882 (22 Stat. 58). The matter was taken into court on habeas corpus and the detained was discharged. (*In re Low Yam Chow on Habeas Corpus*, 13 Fed. 612.) Judge Hoffman stated the case as follows:

> "Referring to the terms of Section 6, which have been cited, it will, we think, be apparent that the persons contemplated in its provisions are Chinese merchants, etc., coming *from China* to the United States and not Chinese merchants coming to this country from other parts of the world. The certificate is to be furnished by the Chinese government or under its authority. It must state the name, age, height and all physical peculiarities, former and present occupation, and place of residence in China, of the person to whom it is issued. How could a Chinese merchant who has resided maybe for ten or twenty or thirty years in London or Calcutta, or Callao or Panama, obtain such a certificate? Certainly not without going to China for that purpose, and how, if he should revisit his country with that object, could the certificate state as required, *his place of residence in China?*" (Italics ours.)

Circuit Justice Field, reviewing the same case September 5, 1882, 13 Fed. 605, in a lengthy opinion to which this Court's attention is particularly called, held that the section requiring a certificate for Chinese merchants coming to the United States does not apply to those who resided out of China on the passage of

the Act of Congress, and the proof of their occupation could be made by parol. In other words, a Chinese applicant for admission to the United States claiming to be a merchant, coming from any country foreign to China, could be admitted without a Section 6 certificate on the mere furnishing of parol evidence as to his status.

In order to correct this situation Congress amended Section 6 of the Act of 1882 by the enactment of July 5, 1884 (23 Stat. 115) supra. This amendment was intended to compel every Chinese merchant seeking admission to present a Section 6 certificate issued either by the government of China or the government of the country where the merchant last resided. That the government intended and placed this construction upon this statute is further shown by the Treaty of December 8, 1894, (28 Stat. 1210) between China and the United States. Article III provides that: "Chinese subjects being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers," when seeking admission into the United States, "may produce a certificate from their government or the government where they last resided." This Treaty was in existence for ten years and it is reasonable to suppose that the adoption of this self executing treaty was in conformity with and intended to carry out the amendment of July 5, 1884. (23 Stat. 115, supra.)

The government contends that the word "subject" as used in Section 6 of the Act of July 5, 1884, supra, means either a native born or naturalized citizen of the country issuing said certificate. If this is the

proper construction, then it is apparent that many Chinese merchants residing in countries foreign to China would never be able to visit the United States and would receive no benefit from the Treaty existing between the United States and China.

The Exclusion Law (Section 6) provides that said certificate may be issued by "such other foreign government of which *at the time* such Chinese person *shall be a subject.*" The word "subject" is preceded by "at the time," clearly showing that this clause has reference to Chinese persons who are merely *temporary* "subjects" of some other foreign country, but are actually Chinese subjects. In other words, if the clause had application to Chinese persons *who are natives* of, or *owe permanent allegience* to some foreign government other than China, the clause would doubtless have read: "such other foreign government of which such Chinese person shall be a subject," omitting the words "at the time," which clearly shows that they have reference to a temporary residence or allegiance.

It must be remembered that the Treaty was with China and was intended to apply to all Chinese subjects whether residing in China or some other foreign country as is stated in the opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case, (page 21 of the record in the Loi Hoa case) which is as follows:

> "Appellants contend that the word 'subject' as used in the Exclusion Act means one who is resident in or domiciled in 'such other foreign' country, and they find support of that construc-

tion in the words 'of which at the time.' We think the contention must be sustained. The treaties with China and the statutes enacted in pursuance thereof were obviously intended only for the benefit of American citizens and Chinese subjects. To become subjects of Indo-China so as to owe allegiance to the government thereof these appellants would have been required to renounce their allegiance to the country in which they were born, and all rights which they theretofore had as subjects of China. We think it inconceivable that either by the United States or by China the benefits of the treaty here involved were intended to be extended to subjects of other nations.

This reasoning is rejected by the Department of Labor for the reason, it is said, 'that Chinese may, if they so desire, become citizens or subjects of other nations by naturalization,' and thus obtain certificates under Section 6. But it is not to be supposed that in entering into the treaties with the United States the Chinese Government had in mind the protection of Chinese who had transferred their allegiance to other countries and had ceased to be Chinese subjects. This is denied by the very terms of the treaties. In the Treaty of November 17, 1880, it was declared that the purpose thereof was to promote commercial relations 'between the citizens and subjects of the two powers.' And in the treaty of March 17, 1894, it was recited that the purpose was 'to protect the citizens or subjects of each within the jurisdiction of the other.' And it is significant as expressing the understanding of the high contracting parties that in that treaty, which was in force for a period of ten years, it was expressly provided that in order that Chinese merchants and others of the favored class might be admitted to the United States, they might produce a certificate from their government, 'or the government where they last resided'."

The "subject" of a country is not exclusively or necessarily a native born or naturalized citizen owing permanent allegiance to such country. As was said by the Supreme Court in the case of *The Pizarro,* 2 Wheat. (U. S.) 227, 245, 4 L. ed. 226, 231:

> "As to the second objection, it assumes, as its basis, that the term 'subjects,' as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term 'subjects,' when applied to persons owing allegiance to Spain, must be construed in the same sense as the term 'citizen' or 'inhabitants' when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction is, that in the 18th article of the treaty, the term '*subjects,*' '*people,*' and '*inhabitants,*' are indiscriminately used as *synonymous* to designate the same persons in both countries, and in cases obviously within the scope of the preceding articles.
>
> Indeed, in the language of the law of nations, which is always to be consulted in the interpretations of treaties, *a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country while he resides in it; temporarily, indeed,* if he has not, by birth or naturalization contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace."

See also the case of *Carlisle v. U. S.,* (83 U. S. 147, 21 L. ed. 426, 429), to the same effect, and where it is

said that an alien whilst domiciled in a foreign country owes a local and temporary allegiance to such country which continues during the period of his residence, and he may be punished for treason or other crimes the same as a native born subject might be; he is a "subject" of the country where he resides, although he may be only a temporary subject of that country.

That this is the correct interpretation of the term "subject" as used in Section 6 supra, is further emphasized by the provision heretofore referred to contained in Article III of the treaty of 1894, supra, between the United States and China, which permitted Chinese subjects to "produce a certificate from their government or the government where they last resided".

It is conceded by the petitioner that the official who issued the Section 6 certificate to the respondent was duly authorized to do so by the French Indo-China government. (Original immigration record Exhibit "A", page 35.) It is also conceded that the Chinese government has never authorized any person to issue Section 6 certificates to citizens of China residing in French Indo-China. The respondent therefore applied to the French Indo-China government and was after investigation by the proper officials of said government, and further investigation by the appropriate Consular representative of the United States and visaed by him, given a Section 6 certificate.

It appears from the brief of the Solicitor General that he thinks the question here involved is an entirely new one, and that there is a danger of an influx of Chinese immigration if this Court should sustain

the decision of the Circuit Court. As a matter of fact there are very few Chinese applicants for admission to the United States from countries foreign to China, and even from China itself, and the Chinese population is dwindling under Bureaucratic interpretation and enforcement of the immigration and exclusion laws. It is apparent if at all necessary that this is a question for legislative consideration.

All laws are to be construed as to avoid an unjust or absurd conclusion, and general terms are to be so limited in their application as not to lead to injustice, oppression or an absurd consequence.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be sustained.

Dated, San Francisco,
November 25, 1927.

Respectfully submitted,

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JOSEPH P. FALLON,
Attorneys for Respondent.